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In the Supreme Court of the United States

OCTOBER TERM, 1939

J. E. RILEY INVESTMENT COMPANY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 19–28) is unreported. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 48–58) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 26, 1939. (R. 46.) Petition for rehearing was denied March 16, 1940. (R. 47.) The petition for a writ of certiorari was filed April

11, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an election by a taxpayer to compute depletion on a percentage depletion basis is made in its "first return," as required by Section 114 (b) (4) of the Revenue Act of 1934, when it is first made in an amended return, filed after the expiration of the period for filing the original return.

STATUTE INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 1. APPLICATION OF TITLE.
>
> The provisions of this title shall apply only to taxable years beginning after December 31, 1933. * * *
>
> (U. S. C., Title 26, Sec. 1.)
>
> SEC. 114. BASIS FOR DEPRECIATION AND DEPLETION.
>
> * * * * *
>
> (b) *Basis for Depletion.*—
>
> * * * * *
>
> (4) *Percentage depletion for coal and metal mines and sulphur.*—The allowance for depletion under section 23 (m) shall be, in the case of coal mines, 5 per centum, in the case of metal mines, 15 per centum, and, in the case of sulphur mines or deposits, 23 per centum, of the gross income from the

property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property. A taxpayer making his first return under this title in respect of a property shall state whether he elects to have the depletion allowance for such property for the taxable year for which the return is made computed with or without regard to percentage depletion, and the depletion allowance in respect of such property for such year shall be computed according to the election thus made. If the taxpayer fails to make such statement in the return, the depletion allowance for such property for such year shall be computed without reference to percentage depletion. The method, determined as above, of computing the depletion allowance shall be applied in the case of the property for all taxable years in which it is in the hands of such taxpayer, or of any other person if the basis of the property (for determining gain) in his hands is, under section 113, determined by reference to the basis in the hands of such taxpayer, either directly or through one or more substituted bases, as defined in that section.

(U. S. C., Title 26, Sec. 114.)

STATEMENT

The facts as found by the Board of Tax Appeals (R. 19–22) may be summarized as follows:

Petitioner is a Nevada corporation with its principal office and place of business at Flat, Alaska, where it is engaged in the mining of gold. Flat is in a remote part of the Territory, and conditions of travel are such that it takes weeks for mail originating at that place to reach Tacoma, Washington, where the office of the Collector of Internal Revenue having jurisdiction over the petitioner is located. The slowness of the winter service invariably results in current tax return forms reaching Flat too late for timely execution and filing. In order to avoid delinquency, it has been the custom of petitioner's officers to use old return forms; consequently petitioner's original return for 1934 was filed on a 1933 form which had been mailed to it by the Collector at Tacoma. (R. 19–20.)

When petitioner's return for 1934 was made out, its officers did not know of the statutory provision allowing percentage depletion, but did know that, unless the law had been changed, petitioner was not entitled to depletion, as it had no basis for cost depletion. The Collector, in sending the forms, had not advised petitioner with respect to percentage depletion. Had petitioner's officers known of the 1934 statutory provision, they would have elected to take advantage of it. Petitioner first actually learned of the provision in August, 1935, when it

was advised by a revenue agent that it was entitled to percentage depletion for both 1933 and 1934. The agent prepared reports to that effect, as a result of which a refund was paid for 1933, but not for 1934. The Commissioner ruled that, as to the latter year, the taxpayer, by failing to claim percentage depletion in its original return, had lost the right to claim it thereafter. (R. 20–22.)

On March 3, 1936, immediately after petitioner was advised that percentage depletion had been disallowed, it filed both an amended return claiming such depletion and a claim for refund (R. 8, 22). On petition for redetermination, the Board of Tax Appeals upheld the Commissioner's ruling denying percentage depletion (R. 29) and the court below affirmed (R. 46).

ARGUMENT

1. Petitioner urges that certiorari be granted because of an alleged conflict between the decision below and the decision of the Circuit Court of Appeals for the Fourth Circuit in *C. H. Mead Coal Co.* v. *Commissioner*, 106 F. (2d) 388. In the *Mead* case, the taxpayer filed its tax return for 1934 on March 15, 1935, making no claim for a depletion deduction. On February 6, 1936, it filed an amended return for 1934 in which such deduction was claimed, computed on the percentage basis. The court held that the taxpayer was entitled to the deduction on the ground that the words "first return" as used in Section 114 (b) (4) of the Revenue Act of 1934

include an amended return for the first taxable year, "provided the amendment be timely" (p. 390). It apparently considered the amendment to be timely because made before the time for filing the taxpayer's return for the next succeeding year (*id.*).

The court below, in the present case, accepted the basic premise of the *Mead* decision that "first return" includes a timely amendment to an original return for the first tax year. It held, however, that an amendment is not timely unless filed within the time within which an original return may be filed, or within such extended time, not exceeding six months, as has been granted by the Commissioner under Section 53 (a) (2) of the Revenue Act of 1934. The conflict between this decision and the *Mead* decision is, therefore, only on the narrow issue of when an amendment must be filed in order to be timely.

This issue has, we believe, been resolved by the decision of this Court in *Haggar Co.* v. *Helvering*, No. 176, present Term. That case involved the construction of the phrase "first return" as used in the capital stock provisions of the Revenue Act of 1934; the Court held that an amended return, filed during the extended time allowed by the Commissioner for filing the first return under the Act, was a timely return and should have been accepted. Although the question was not directly presented or decided, the clear implication of the opinion is that a return is timely only if filed within the period

allowed for filing original returns. The Court expressly pointed out, for example, that "it has long been the practice of the department, in the cases of other types of tax to accept an amended return, filed within the period allowed for filing returns, as the return of the taxpayer for the taxable year".

This interpretation of the *Haggar* decision is confirmed by the fact that the statute gives no right to file an amended return after the expiration of the statutory period, as extended by the Commissioner, for filing the original return. No statutory provision and no regulation or practice supports the view that an amended return is timely if filed before the time for the filing of the return for the next year. Consequently, when this Court, in its opinion in the *Haggar* case, spoke of a "timely amendment", the time limitation referred to must have been the statutory period for filing original returns.[1]

2. Petitioner also alleges that the court below erred by disposing of the case on a ground not considered by the Board. The case was argued by the Commissioner before the Board, and was decided by the Board, on the theory that an amended return

[1] Although the Court in the *Haggar* case referred to the *Mead* decision as an instance where an amended return was considered as a first return, its citation of that decision clearly does not indicate approval of the holding that the amended return in that case was timely since the Court was not concerned with that question.

was not a "first return" irrespective of the question of timeliness. Petitioner contends that, in this posture of the case, the court below could not with propriety consider or decide the question of the timeliness of the amendment. The contention runs directly counter to the decision of this Court in *Helvering* v. *Gowran,* 302 U. S. 238, holding that a Circuit Court of Appeals may *affirm* a decision of the Board of Tax Appeals upon a theory not presented to or considered by the Board. *Helvering* v. *Wood,* No. 384, present Term, cited by petitioner, holds merely that a decision of a lower court may not be *reversed* on a ground not presented or considered below. That rule is, of course, inapplicable here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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